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Issue Date: 26 July 2007

CASE NOS. 2005-LHC-01540
2006-LHC-00217

OWCP NOS. 15-44298
15-048598

In the Matter of:

K. D.,
Claimant

vs.

KWAJALEIN RANGE SERVICES,
Employer,

and

AIG WORLDSOURCE,
Carrier,

and

RAYTHEON RANGE SERVICES
Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,
Carrier.

DECISION AND ORDER

This compensation claim was filed under the Defense Base Act ("DBA"), 42 U.S.C. § 1651, an extension of the Longshore and Harbor Workers' Compensation Act ("the Act"), 33 U.S.C. § 901 *et seq*. The Act compensates employees who sustain work-related injuries or suffer from occupational diseases from employment without regard to fault. The Claimant, a 54-year-old photo-optics technician, seeks benefits from his current employer Kwajalein Range Services ("KRS") and former employer Raytheon Range Services ("Raytheon") for injuries to his left knee, right knee, and lower back. He claims these injuries are related to a previous industrial injury to his left knee, and that his injuries have worsened substantially over time.

The claims against respondents KRS and Raytheon and their insurance carriers were consolidated into a single action. On December 21, 2005, KRS and AIG Worldsource (on behalf of the insurer) agreed to provide medical and disability benefits for the Claimant. They requested that the case be remanded to the Office of Workers' Compensation Programs, but reserved the issue of last responsible employer for adjudication at a later date.

The parties agreed to submit briefs in lieu of a trial on the issue of which was the last responsible employer. KRS submitted KRS Exhibits ("KX") numbered 1-19. Raytheon submitted Raytheon Exhibits ("RX") numbered 1-48. Claimant did not provide a brief or exhibits to the current action. Neither party has objected to the other's exhibits; all are admitted into evidence.

STIPULATIONS

No dispute exists as to the following issues, the parties have stipulated that:

1: The Act covers the claim;

2: The Claimant has worked on Kwajalein Atoll since April 1996;

3: The Claimant suffered a left knee injury while employed with Raytheon on November 16, 1999;

4: Dr. Sydney Smith performed surgery on the Claimant's left knee in Honolulu, Hawaii on April 6, 2000;

5: Dr. Daniel Robertson performed a second surgery on the Claimant's left knee in Fredericksburg, Texas on April 3, 2001;

6: Raytheon paid for these two left knee surgeries;

7: The Claimant accepted an offer of employment from KRS on December 9, 2002;

8: KRS succeeded Raytheon as missile defense contractor on Kwajalein on March 1, 2003;

9: The Claimant began his employment as a photo-optics technician with KRS on March 1, 2003;

10: The Claimant remains employed as a photo-optics technician with KRS;

11: The Claimant's current claim seeks medical care and disability benefits as a result of bilateral knee and lower back injuries he suffered while working on Kwajalein;

12: At all times relevant to this claim, insurance coverage under the Act was provided

for Raytheon by Liberty Mutual Insurance Company, and

13: At all times relevant to this claim, insurance coverage under the Act was provided for KRS by Insurance Company of the State of Pennsylvania, adjusted by AIG Worldsource.

ISSUES PRESENTED

Is KRS or Raytheon liable for the Claimant's bilateral knee and back injuries as his last responsible employer.

FINDINGS OF FACT

Background

The Claimant began working as a photo-optics technician for Raytheon on Kwajalein Atoll in April of 1996.[1] RX 12 at 10-11. His duties included setting up cameras to record missile tests as well as maintaining various photographic equipment. RX 12 at 12. The work often required him to carry heavy equipment long distances over uneven ground and up the stairs and ladders of observation towers. RX 8; 12 at 207-208.

Judge Stansell-Gamm found the Claimant initially injured his left knee on November 16, 1999, while playing soccer on Kwajalein, or while lifting and squatting to move heavy equipment in December, 1999, or from a combination of those two. RX 10 at 43, RX 12 at 18. When initial treatments on Kwajalein failed, he was treated by Dr. Sydney Smith,[2] in Honolulu, Hawaii, who diagnosed a left medial meniscal tear. RX 16. On April 6, 2000, the Claimant underwent arthroscopic surgery to repair the damage to his left knee. RX 17. He initially felt the surgery was successful, but by November of 2000, his knee pain returned. RX 18; 19. Judge Stansell-Gamm found the left knee deteriorated further due to work on Wake Island in February 2001. RX 10 at 48 and footnote 45.

When he returned home to Texas, the Claimant consulted with his family physician about his increasing left knee pain. The Claimant's physician referred him to Daniel B. Robertson, M.D., an orthopedic surgeon in Fredericksburg, Texas. RX 11 at 6. Dr. Robertson noted an abnormality of the medial meniscus in the Claimant's left knee which could have represented a post-surgical change. RX 10 at 48, RX 11 at 9. He also noted that the Claimant had a *genu varum* or bow-legged deformity in his lower extremities. *Id*. On April 3, 2001, Dr. Robertson performed a second arthroscopic surgery to repair the Claimant's left knee. *Id*. at 13. He made a

[1] Kwajalein Atoll is a coral atoll composed of 97 separate islands with a total land area of 16.4 Km^2. Of these 97 islands, 11 are used by the United States military as part of the Ronald Reagan test range ("RTS") with the majority of operations located on Kwajalein Island in the south and Roi-Namur Island in the north. The RTS also extends to cover several other islands in the outlying area, including Wake Island. Kwajalein—Wikipedia, http://www.wikipedia.org/wiki/kwajalein (last visited July 3, 2007).

[2] Claimant was seen by Dr. Sydney Smith solely for this original left knee injury. No further evidence from Dr. Sydney Smith is involved in this case. Any subsequent reference to "Dr. Smith" refers to Dr. Robert L. Smith.

postoperative diagnosis of a degenerative-type tear of the left medial meniscus, status post partial medial menisectomy, with a radial tear of the left lateral meniscus and chondromalacia. RX 20.[3]

The Claimant's knee pain diminished after the second surgery and Dr. Robertson released him to return to work on June 4, 2001. RX 22. On October 3, 2001, Dr. Robertson found the Claimant's left knee had reached maximum medical improvement and assigned a 22% impairment rating according to the 4th edition of the *AMA Guides to the Evaluation of Permanent Impairment* ("AMA *Guides*"). RX 11 at 30; RX 23. Administrative Law Judge Richard Stansell-Gamm granted benefits to the Claimant for his left knee injury. *Davis v. Raytheon Range Systems Eng*. 2003-LHC-631, 632 (ALJ Sep. 10, 2004).

The Claimant began experiencing pain in his right knee in 2002. Edward Paget, M.D., the physician at Kwajalein Hospital who treated the Claimant's right knee pain, thought it was due to the Claimant favoring his left knee and shifting his weight to his right knee, which put greater stress on the right knee. RX 25. Upon examination, Dr. Paget reported grating and popping (*i.e.* crepitus) in both knees. KX 4, p 109. Dr. Robertson gave a similar opinion during a follow-up examination on July 31, 2002. RX 26. Dr. Robertson took x-rays of the Claimant's right knee and found some medial joint space narrowing that led him to believe the Claimant may have had some damage to the right medial meniscus as well as chondromalacia. RX 26.

The Claimant's right knee problems worsened in December of 2002, when his left knee buckled while he was descending a flight of stairs. He fell down the final three steps and as he landed "did the splits with [his] left leg up underneath [him]." RX 12 at 24-25. The Claimant felt immediate pain in both knees as well as his lower back following this accident. *Id*. at 25-26. He reported the accident and pain to Dr. Paget, who recommended a brace for the left knee. RX 27.

KRS succeeded Raytheon as the missile-defense contractor on Kwajalein on March 1, 2003. RX 5. The Claimant's professional duties did not change when the employer changed. RX 12 at 50. He remains employed with KRS. *Id*. at 10.

In an attempt to alleviate his knee pain, the Claimant had a series of Synvisc injections during February of 2003.[4] KX 3 at 85-86. On April 28, 2003, Dr. Robertson re-examined him and, finding little improvement from the injections, diagnosed osteoarthritis in both knees. *Id*. Dr. Robertson subsequently ordered MRIs of both knees. *Id*.

MRI scans of the left knee showed a tear of the anterior cruciate ligament ("ACL") and post-surgical changes of the medial meniscus. RX 29. The MRI of the right knee showed a chronic tear of the medial meniscus with chondromalacia. RX 30. After reviewing the MRIs, Dr. Robertson recommended that the Claimant use a brace on his left knee to lessen the impact on the right. RX 31.

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[3] The operative report originally diagnosed "degenerative type tear of the right medial meniscus." Dr. Robertson admitted this diagnosis was erroneous and corrected it in deposition testimony. RX 11 at 14.

[4] Synvisc is the brand name of a synthetic synovial fluid, the fluid found naturally in the knees that lubricates the joint. How Does Synvisc Work?, http://www.synvisc.com/aboutSYNVISC/ussyn_pt_aboutHowWorks.aspx (last visited July 13, 2007).

The Claimant suffered another fall on the island of Legan on June 5, 2003 while he waited for a transport barge to arrive. RX 12 at 33. When he turned to answer the call of one of his co-workers, his left knee buckled, causing him to fall to his knees on the rocky shore. *Id.* at 34. Two days later, the Claimant visited Dr. Paget, complaining of back and knee pain. RX 32. Dr. Paget recorded the complaints, but observed only that Complainant was ambulatory and suffered scrapes and abrasions from that fall. He diagnosed the Claimant with an unstable left knee and prescribed pain medication. *Id*.

The Claimant sought no further treatment for his knees or back until May 19, 2004, when he visited Dr. Robertson. RX 33. X-rays taken at that time indicated narrowing of the medial joint space in both knees. *Id*. Dr. Robertson opined that the Claimant had a possible ACL sprain or injury in his left knee, chondromalacia and a medial meniscus tear in his right knee, and chronic lumbar strain in his lower back. *Id*. Dr. Robertson recommended that Claimant limit his activities on hills, stairs, and ladders, and use a knee brace. RX 33. He also prescribed whirlpool baths for the Claimant's bilateral knee pain and a motorized scooter for use while on Kwajalein. RX 34.

The Claimant's right knee pain continued to worsen. RX 35. On November 3, 2004 the Claimant complained to Dr. Paget of increased pain. Dr. Paget diagnosed chronic back pain and an internal derangement of the right knee, prescribed pain medication and suggested that the Claimant follow up with Dr. Robertson. *Id*.

Dr. Robertson found no substantial changes in the knees when he re-examined the Claimant on December 17, 2004. RX 36. He advised the Claimant to continue to use the knee braces, to have a second round of Synvisc injections, and to have physical therapy for his knees and back. *Id*. Dr. Robertson observed a limited range of motion and evidence of pain as he examined the Claimant's low back. *Id*. X-rays of the Claimant's spine and pelvis showed substantial degenerative changes with disk narrowing at the L4-5 and L5-S1 levels as well as extensive spur formation. *Id*. Dr. Robertson diagnosed the Claimant's condition as lower back pain with underlying degenerative disk disease and spur formation, with pain exacerbated by recent falls related to chronic knee problems. *Id*.

The Claimant began physical therapy for his knees and back on January 27, 2005 at Kwajalein Hospital. RX 39. He had more cortisone and Synvisc injections in his knees at around the same time. RX 38. In March of 2005, the physical therapy staff recommended various restrictions on the Claimant's employment in order to minimize the risk of further injury. RX 28. On March 29, 2005, KRS agreed to accommodate the Claimant's restrictions which included: no climbing of ladders, scaffolding, towers, surfaces, or trees taller than 12 feet above ground; no crawling, kneeling, crouching or stooping; ascent and descent of stairs should be done cautiously; lifting/bending/twisting of the back should be done with attention to proper lifting/ergonomics; and carrying/lifting/pushing of any weight greater than 20 pounds should be done cautiously and carefully. KX 7 pp. 27-28; KX 9 p. 148.

Even while observing the restrictions, the Claimant's knees continued to worsen. MRIs of both knees taken on June 9, 2005 showed moderate degeneration of the medial joint

compartment in both knees and tears in the medial meniscus of the left knee. RX 40; 41. The radiologist who read the MRI of the right knee saw a tear in the right medial meniscus that looked to have occurred after a partial menisectomy, even though the Claimant never had surgery to his right knee. RX 41. With no history of surgery of the right knee, the radiologist diagnosed an extensive tear of the right medial meniscus. *Id.*

After reviewing the results of the MRIs, Dr. Robertson believed that the Claimant's right knee had degenerated to the point that it was worse than the left, and recommended arthroscopic surgery. KX 3 p. 93. He reiterated his diagnosis of degenerative disk disease causing lower back pain, but added that the pain was aggravated by the Claimant's gait, balance, and limping. *Id*. The arthroscopic procedure on the right knee performed on February 20, 2006 consisted of a partial medial and lateral menisectomy with debridement and chondroplasty. KX 3 p. 94. Dr. Robertson cleared the Claimant to return to work on March 9, 2006. KX 15.

On October 24, 2005 Robert L. Smith, M.D., an orthopedic surgeon in Honolulu Hawaii, examined the Claimant on behalf of KRS. KX 11; RX 47. Dr. Smith opined that the Claimant's knee conditions were the result of pre-existing age and genetically based osteoarthritis exacerbated by *genu varum* alignment, morbid obesity, and previous surgeries resulting from the 1999 soccer injury. KX 11 p. 204. Dr. Smith saw no evidence the condition of the Claimant's knees was exacerbated or aggravated by his work on Kwajalein. *Id*. After reviewing the MRIs taken on May 1, 2003 and June 9, 2005, Dr. Smith saw no substantial changes to the Claimant's knees during the two year period between the MRIs. *Id.*

Dr. Smith also examined the Claimant's lower back and concluded that the pain was the result of degenerative disk disease caused by age, genetics and morbid obesity. *Id*. He further added that degenerative disk disease is a normal finding, given its prevalence among the general population. *Id.*

When considering a possible connection between the Claimant's previous left knee injury and his current ailments, Dr. Smith doubted that an injury to the left knee even occurred in 1999, explaining that "[a]n injury label provided as attributable to the 11/16/99 incident was speculative." KX 11 p. 205. Dr. Smith concluded that the Claimant's right knee injury could not be attributed with any degree of certainty to the left knee or that his lower back pain could be attributed to his knees. *Id*. He disagreed with Dr. Paget's finding that favoring one leg causes degenerative changes in the other because medical literature does not support this impression. *Id*.

On October 27, 2006, Leonard Cupo, M.D., M.P.H. examined the Claimant on behalf of Raytheon. Dr. Cupo's findings supported the previous diagnoses of degenerative joint and disk disease in the Claimant's back and knees. RX 13. He also reported that while the main cause of the degenerative conditions was the Claimant's chronic obesity, his work activities and the fall of June 2003 greatly aggravated and exacerbated the conditions. RX 13 at 7.

CONCLUSIONS OF LAW

The Act is liberally construed in favor of injured employees. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); J.*B. Vozzolo, Inc. v. Britton*, 377 F.2d 133 (D.C. Cir. 1967). An injured worker is required to prove the elements of the claim by a preponderance of the evidence. *Director OWCP v. Greenwich Colleries* (Maher Terminals), 512 U.S. 267 (1994). I am entitled to evaluate the credibility of witnesses, weigh the evidence and draw my own inferences, and am not bound to accept the opinion or theory of any particular medical examiner. *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. & Hartford Accident & Indem. Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Banks v. Chi. Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968).

The Claimant sustained his first injury to his left knee on November 3, 1999, while employed by Raytheon. The crux of the matter is whether the Claimant's current conditions are the natural and unavoidable consequence of this original left knee injury, or are the result of a work-related aggravation of underlying conditions. If they are the result of the original injury, liability falls on the employer at the time of the original injury, Raytheon. *See Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954). If the Claimant's ongoing work at RTS aggravated the underlying conditions, liability falls on the last employer to expose the Claimant to injurious stimuli, KRS. *See Gardner v. Bath Iron Works Corp*., 11 BRBS 556 (1979).

The Act defines an injury as any accidental injury "arising out of and in the course of employment, and such occupational disease or infection that arises naturally out of such employment or as naturally or unavoidably results from such accidental injury." 33 U.S.C. § 902(2). Aggravation of the symptoms of an underlying condition constitutes a compensable injury under the Act. *Delaware River Stevedores v. Director, O.W.C.P.*, 279 F.3d 233, 243 (3rd Cir. 2002). The weight of the evidence persuades me that the Claimant injured his left knee in 1999 playing soccer. Dr. Smith doubted this, but used a definition that differs from the Act when he questioned the etiology of the injury. It makes no difference if the injury arose from the soccer injury, or from squatting and lifting in December of 1999, from other work in February 2001, or from some combination of all those and ongoing walking, lifting and carrying at work. Many of Dr. Smith's opinions attempt to define the Claimant's injuries in terms of a specific, express, and direct injury. RX 14 at 40. This is not the Act's standard, which encompasses cumulative trauma. Consequently, Dr. Smith's opinions are accorded less weight where he applies his narrower definition.

Causation

Section 20(a) of the Act presumes that a claim falls under the Act when a claimant shows that he or she sustained physical harm, and that an accident occurred or working conditions existed that could have caused the harm. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Testimony and medical evidence from Dr. Robertson demonstrated that the Claimant suffered bilateral knee injuries and an injury to his lower back. The Claimant showed that working conditions on Kwajalein could have caused them. The Claimant has met the Section 20(a) burden and is entitled to the presumption.

Once a claimant establishes the presumption, the burden shifts to the respondents to rebut it by providing substantial evidence that the injury was not caused or aggravated by the claimant's employment. *Quinones v. H.B. Zachary, Inc.*, 32 BRBS 6, 8 (1998). Here, the employers must provide evidence showing that the Claimant's bilateral knee and lower back conditions were not aggravated or otherwise worsened by his employment. *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986).

A physician's unequivocal testimony that there is no relationship between the claimant's employment and injury is sufficient to rebut the Section 20(a) presumption. *O'Kelley v. Department of the Army/NAE*, 34 BRBS 39 (2000). Respondent KRS submitted that type of evidence with Dr. Smith's report and testimony that the Claimant's knees and back are the result of natural degenerative processes. The presumption drops from the case and the issue of causation must be decided by the evidence as a whole. *See Del Vecchio v. Bowers*, 296 U.S. 280, 287 (1935).

Left Knee

The Claimant first injured his left knee on November 16, 1999 during a soccer game on Kwajalein, then from squatting and lifting to move heavy equipment about a month later, and again from working on Wake Island in February 2001, injuries that have required two surgeries to correct. He now claims that his left knee has worsened due to his employment activities.

A second injury that combines with or aggravates a pre-existing injury is in itself a compensable injury. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). So long as it is not just the natural progression of the first injury, the aggravation is an entirely new and separate injury and the claimant is considered to have been "reinjured." *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986). If the Claimant's work after his first left knee injuries in late 1999 and early 2001 caused an aggravation of his left knee condition, the resulting injury to his left knee is considered a separate injury. The buckling of the left knee and fall onto his knees at the rocky shore in June 2003 while working on Legan is that type of injury.

Medical records demonstrate that there has been a progressive worsening of the Claimant's left knee condition. The MRI taken in 2003 showed a possible re-sectioning of the medial meniscus in the left knee. An MRI of Claimant's left knee taken in 2005 showed marked changes in the medial meniscus including a degenerative tear in the posterior horn and a free margin tear of the anterior horn. While these tears may represent the post-surgical re-sectioning referred to in the 2003 MRI, the 2005 MRI also noted free margin fraying of the lateral meniscus, a condition absent in the 2003 MRI. This difference persuade me that the Claimant's left knee condition worsened substantially during the period between the MRIs.

Medical evidence tends to attribute this aggravation to the Claimant's work activities on Kwajalein. Dr. Cupo states specifically that the progression of the Claimant's degenerative joint disease can be attributed to his work activities as a field engineer. RX 45 at 21. The Claimant himself stated that the pain in both of his knees increased following the fall on Legan in 2003. His testimony that the symptoms have been aggravated due to his employment provides a causal link between his employment and his injury. *Cf. Sylvester v. Bethlehem Steel Corp.*, 14 BRBS

234, 236 (1981) (explaining that credible testimony of subjective complaints and injurious work conditions are sufficient for *prima facie* case under Section 20(a)).

The Claimant's assertion that his employment with Raytheon caused increased symptoms in his left knee underscores the connection between work and aggravation. The Claimant's work with Raytheon required him to be on his feet more than half the day, which caused increased pain in his left knee as time went by. RX 12 at 19-21. He does the same work for KRS. I conclude that the Claimant's work at KRS affected his symptoms no less than the work he did for Raytheon.

Dr. Smith did not provide a concrete conclusion regarding a link between the Claimant's work and his injuries. He stated that the Claimant's knee condition is not attributable to his work activities alone. This fails to rule out the Claimant's employment as a contributor to the aggravation, and I find that the work did worsen the knee condition. Dr. Cupo's analysis is the more convincing one, and his report specifically found that work on Kwajalein contributed to his injury. Dr. Smith's report, on the other hand, discusses specific activities only in regard to the Claimant's limitations rather than causation.

I conclude that work on Kwajalein aggravated the Claimant's left knee condition. This aggravation constitutes an independent compensable injury under the Act.

Right Knee injury

The Claimant first began suffering from right knee pain in 2002 while employed by Raytheon. Medical evidence shows that this pain arose from pre-existing degenerative joint disease that has worsened over time. The only evidence submitted that does not support this conclusion is that of Dr. Smith, who compared two MRIs of the Claimant's knees, taken two years apart, and found no significant changes in them. This conclusion conflicts with the findings of every other examining physician, including the Claimant's treating physician, who found based on a 2005 MRI that the Claimant's right knee had deteriorated substantially since the 2003 MRI.[5]

The MRIs themselves have been interpreted as showing extensive physical changes in the right knee over a two-year period. The MRI of May 1, 2003 demonstrated a chronic tear of the medial meniscus with chondromalacia. The later MRI of June 9, 2005 shows a tear of the medial meniscus so severe that the radiologist who read it thought the Claimant had undergone a partial menisectomy, although no surgery had occurred. Such extensive degeneration convinces me that there was a substantial worsening of the Claimant's right knee over the course of two years.

[5] A treating physician's testimony is not automatically entitled to greater weight when the issue is causation rather than the course of medical treatment to be followed. *Duhagan v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997). Given Dr. Robertson's long acquaintance with the Claimant, his testimony and opinions regarding long term changes in the Claimant's injuries is more convincing than that of a single independent medical examination. *See Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998) (explaining that greater weight is afforded to treating physicians because "he is employed to cure and has a greater opportunity to know and observe the patient as an individual").

In contrast to Dr. Smith's findings, the Claimant himself testified that all of his injuries have progressively worsened over the years. This subjective testimony correlates with the medical evidence from his two treating physicians, Dr. Robertson and Dr. Paget. For example, reports from Dr. Robertson show that the Claimant's right knee has worsened from causing little pain in 2002 to the point of requiring surgery in 2006.

An administrative law judge is not bound to accept the opinion of a physician if rational inferences lead to a contrary conclusion. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Ennis v. O'Hearne*, 223 F.2d 755 (4th Cir. 1955). The weight of the evidence persuades me that the Claimant's right knee has worsened over time. I reject Dr. Smith's conclusion that there has been no aggravation of the Claimant's right knee condition.

Nor do I accept Dr. Smith's assessment that the Claimant's work did not cause an aggravation. Medical reports from Dr. Cupo and Dr. Robertson provide a specific link between the Claimant's work and injuries. Dr. Cupo's report specifically diagnoses degenerative joint disease with aggravation caused by work activities. Dr. Robertson provided a similar diagnosis and instructed the Claimant to limit certain activities inherent in his work. The Claimant worked in full capacity as a photo-optics technician for more than two years before restrictions were placed on his work. The fact that these restrictions were imposed to minimize further injuries leads me to conclude that his previous work had at least some impact on the progression of his injuries. Therefore, I find that Claimant's work activities with Raytheon and KRS caused his right knee injury.

Back Condition

The Claimant first experienced back pain following a fall in 2002. This pain was further aggravated after the fall on Legan in 2003, while he was employed by KRS. All examining physicians concur that the Claimant's back pain is attributable to underlying degenerative joint disease.

Dr. Cupo specifically found that the Claimant's degenerative disk disease has been aggravated by his work with KRS, pointing to the Claimant's 2003 fall. Dr. Smith, on the other hand, states that there has been no specific injury to the Claimant's back as a result of his employment with KRS. Dr. Smith's conclusion is unpersuasive because it relies on a much narrower standard of traumatic injury and does not reflect the standard in the Act. To show an injury under the Act the symptoms of an underlying condition must have increased. *Crum v. Adjustment Bureau*, 738 F.2d 474, 478 (D.C. Cir. 1984). Reports from Dr. Robertson show a steady increase in the Claimant's back pain following the second fall as well as stiffness and reduced mobility in his lower back. This increase in pain is enough to show that the Claimant sustained an injury to his back.

Dr. Smith also posits that degenerative disk disease is a normal symptom of aging and the Claimant's degenerative disk disease is not traumatic in nature. Dr. Smith cites to articles from several medical journals documenting the prevalence of degenerative disk disease in an aging populace. I accept that the Claimant's genetics contribute to his degenerative disk disease, but I cannot accept that the worsening in his back is unrelated to his work (or put another way, comes

only from activities outside his work). The Claimant subjectively links his symptoms to accidents occurring at work, and Dr. Cupo found a connection between the Claimant's work and symptoms. Therefore, Dr. Smith's conclusion that employment played no part in causing the Claimant's degenerative disk disease does not address whether this previous condition was aggravated by the Claimant's work.

The weight of the evidence shows that the Claimant has sustained an aggravation of his pre-existing lumbar degenerative disk disease. Subjective testimony from the Claimant and medical reports from Dr. Cupo show that this was due to the Claimant's employment. I conclude that the Claimant sustained a compensable injury to his lower back.

Other Causes of Injuries

It is immaterial whether the Claimant's degenerative conditions would have worsened on their own. *Wheatley v. Adler*, 407 F.2d at 312, n. 11. The Third Circuit has held that when the conditions of employment cause a claimant's underlying conditions to become symptomatic, the claimant has sustained a compensable injury. *Delaware River Stevedores v. Director, OWCP*, 279 F.3d 233, 241 (3rd Cir. 2002). That is precisely what happened here. Virtually all of the medical evidence supports a diagnosis of degenerative joint and disk diseases. While they may have been asymptomatic for a time, the Claimant's work activities such as walking over uneven ground, standing for long periods, and carrying heavy equipment aggravated these underlying conditions to the point of becoming compensable injuries.

Likewise, it does not matter if the Claimant's daily living activities aggravated his injuries. The Claimant's injuries fall under the DBA, which extends the provisions of the Act to "the injury or death of any employee engaged in any employment . . . under a contract entered into with the United States . . . where such work is to be performed outside the continental United States." 42 U.S.C. § 1651. The Supreme Court has extended benefits under the DBA where the injury did not result from work activities, holding that "[a]ll that is required is that the obligations or conditions of employment create a zone of special danger out of which the injury arose." *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, 507 (1951). The Claimant lived on Kwajalein specifically for the purpose of his employment at RTS, therefore he was within the zone for whatever special dangers the Kwajalein atoll created. *See O'Keefe v. Smith, Hitchman & Grylls Associates*, 380 U.S. 359, 364 (1965) (finding an injury sustained on weekend outing covered and noting that the claimant had to "work [and live under] the exacting and dangerous conditions of Korea"). Even though Kwajalein is relatively developed, the Claimant was still subject to whatever conditions that may have been dangerous to his knees and back (such as uneven ground, hills, and rocky terrain) while conducting his daily non-work activities. Even if his injuries on Kwajalein were not directly the result of his work for the employers they would be covered under the Act. But his work contributed to his bilateral knee and back conditions, as I have already found.

Regardless of their etiology, the Claimant's degenerative conditions serve as a basis for compensable, subsequent injuries if work conditions aggravated the degenerative ailments. I reject the Claimant's theory that his previous left knee injury caused the current injuries. As a whole, the medical evidence shows that the Claimant suffers from degenerative joint and disk

disease, although Dr. Smith's report goes further, stating that these were the result of age and genetics. His two falls temporarily aggravated the degenerative conditions, but no medical evidence demonstrates that the falls caused the degenerative joint and disk conditions.

An administrative law judge, as the trier of fact, determines the credibility of medical witnesses. *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2nd Cir. 1961). I am entitled to accept or reject all or any part of any witness' testimony. *Pimpinella v. Universal Maritime Service, Inc*., 27 BRBS 154 (1993). Dr. Smith reported that the concept of favoring one knee to the detriment of the other is not supported by medical literature. He has worked as an orthopedic surgeon for more than 50 years and while he did not cite to literature to the contrary, I defer to his ample experience and find his conclusion credible.

No other medical reports make such a claim, but Dr. Robertson prescribed knee braces presumably to allow equal weight bearing and alleviate pressure on the Claimant's right knee. However, even with the brace, the right knee continued to worsen. This progression of the injury, notwithstanding the alleviation of pressure, leads me to infer that aggravation was not due to excessive pressure from favoring the left knee. A similar inference is gleaned from the absence of any mention of favoring the left knee as a cause of the Claimant's injuries in Dr. Cupo's report. Medical evidence does not support a conclusion that the Claimant's current right knee injury is the natural progression of the left knee injury.

Finally, both Dr. Cupo and Dr. Smith list the Claimant's obesity as a primary cause of his injuries. Although no physician refutes this, it is unreasonable to conclude that it is the sole cause. Despite diagnoses naming obesity as a cause, both Dr. Cupo and Dr. Robertson assert that the Claimant's work has acted adversely on his injuries. Aggravation does not require that a claimant's work be the primary cause, only a contributory one. *See Generally Independent Stevedore Co. v. O'leary*, 357 F.2d 812 (9th Cir. 1966). The Claimant's work contributed to an aggravation of degenerative conditions, so the entire injury is compensable.

A preponderance of medical evidence shows that the Claimant's employment on Kwajalein has caused substantial aggravation of his bilateral degenerative joint disease and degenerative disk disease of the lower back.

Last Responsible Employer Rule

The last responsible employer rule assigns responsibility for medical benefits and disability payments to the last employer that exposed the claimant to conditions that aggravated or accelerated a prior injury to create the ultimate disability. *Metropolitan Stevedore Co. v. Crescent Wharf and Warehouse Co.*, [Price] 339 F.3d 1102, 1103, 1106-07 (9th Cir. 2003); *Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 623 (9th Cir. 1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). This rule of convenience avoids protracted litigation between employers in multiple-injury cases. *Stevedoring Services of America v. Director, O.W.C.P.*, 297 F.3d 797, 804 (9th Cir. 2002). The employer at the time of work events that lead to the aggravation is the "last responsible employer" for the temporary disability. *Delaware River Stevedores v. Director, O.W.C.P.*, 279 F.3d 233, 241 (3rd Cir. 2002).

The evidence has shown that the physical requirements of the Claimant's employment aggravated his injuries. I am not convinced by any evidence to the contrary; therefore I find that the Claimant's employment on Kwajalein aggravated his degenerative knee conditions and back condition.

The Claimant's work for the two employers was essentially the same. Both employers required the Claimant to walk long distances over uneven ground, climb hills and ladders, and ascend stairs, all of which subsequently aggravated his underlying degenerative conditions. Respondent KRS is the most recent employer to expose the Claimant to aggravating stimuli; it is the employer that last exposed him to injurious conditions. *See Kelaita* 799 F.2d at 1311.

Even though KRS has been very accommodating to the Claimant's injuries and has taken precautions to reduce the risk of further injury, doing so does not alleviate its burden to provide medical care and disability benefits under the Act. The Claimant functioned in full capacity as a photo-optics technician for more than two years before any restrictions were implemented. Courts have relied on testimony from a physician that work during a single day, even without proof of some traumatic event, aggravated a knee condition enough to make constitute a compensable injury. *Price* at 1104. Here, the Complainant's daily work activities for over two years for KRS aggravated his conditions to their current state. The Claimant suffered injuries resulting in compensable disabilities while working for KRS; it is the last responsible employer.

Conclusion

The last responsible employer rule is a bright line rule intended to prevent lengthy trials between co-defendants. *Cordero v. Triple A Mach. Shop*, 580 F.2d 1331, 1336 (9th Cir.1978). The medical evidence demonstrates that the demands of the Claimant's employment aggravated his underlying conditions and thus caused a compensable injury. I find that KRS was the last employer to expose the Claimant to aggravating stimuli. KRS is the last responsible employer and responsible for all benefit payments and medical care under the Act.

ORDER

It is ordered that:

Defendant Kwajalein Range Services and its insurer, Insurance Company of the State of Pennsylvania, shall pay for all of the Claimant's medical care and disability benefits from March 1, 2003 for the Claimant's left knee, right knee, and lower back conditions.

A

William Dorsey
Administrative Law Judge